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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-493

WALTER RAYMOND WHITE,
Petitioner,
vs.
STATE OF INDIANA,
Respondent.

STATE OF INDIANA, *EX REL.*
WALTER RAYMOND WHITE,
Petitioner,
vs.
THE MARION SUPERIOR COURT, CRIMINAL DIVISION, NO. 3, and THE HONORABLE CHARLES C. DAUGHERTY,
Respondents.

REPLY BRIEF OF PETITIONER WALTER RAYMOND WHITE

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TABLE OF AUTHORITIES CITED

	Page
Cases	
Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034 (1977)	3,8
Breed v. Jones, 421 U.S. 519, 95 S.Ct. 1779 (1975)..	3
Constanzi v. Ryan, 368 N.E.2d 12 (Ind. App. 1977)	3,4
Desho v. State, 237 Ind. 308, 145 N.E.2d 429 (1957)	5
Harris v. Washington, 404 U.S. 55, 92 S.Ct. 183 (1971)	7,8
Harshberger v. State, 234 Ind. 127, 124 N.E.2d 211 (1955)	5
Lawrence v. State Tax Commission, 286 U.S. 276, 52 S.Ct. 556 (1932)	7
Miller v. State, 8 Ind. 325 (1856)	4
New York ex rel. Bryant v. Zimmerman, 278 U.S. 63 (1928)	2
North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 516, 94 S.Ct. 407 (1973)	7
Schaaf v. State, 221 Ind. 563, 49 N.E.2d 539 (1943)	5
Schell v. State, 245 Ind. 481, 199 N.E.2d 849 (1964)	5
Turner v. Arkansas, 407 U.S. 366, 92 S.Ct. 2096 (1972)	7,8
United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013 (1975)	3
Wingo v. State, 99 Ind. 343 (1884)	4

Statutes and Rules	Page
28 U.S.C. §1257	2,6,8
Burns' Indiana Statutes Annotated §9-2301	5
Burns Indiana Statutes Annotated, Code Edition, I.C. 35-1-47-1	3,4,5,6
Indiana Rules of Appellate Procedure Rule 4(B)(5)	3
Indiana Rules of Criminal Procedure Rule 16	5

Constitution

Constitution of the United States, Fifth Amendment, *United States Code*, Vol. 1, Page XLVIII	2,7,8

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Respondents have refused to discuss the merits of the question presented for review in their Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Indiana. Instead, Respondents challenge this Court's jurisdiction on certiorari by making three assertions, as follows: (1) the opinion of the Supreme Court of Indiana is not a final determination of Petitioner's pretrial plea of

double jeopardy; (2) Petitioner has a remedy by way of appeal in state court; and (3) Petitioner failed to raise a federal question in the Supreme Court of Indiana. Each contention is patently without merit, and this Court's jurisdiction is properly invoked under 28 U.S.C. §1257(3). Petitioner replies to Respondents' three contentions in inverse order of their presentation by the Respondents.

A. Petitioner Raised His Fifth Amendment Right Against Double Jeopardy in the Supreme Court of Indiana

Respondents challenge the jurisdiction of this Court, contending that Petitioner "has not raised any federal question below." (R. Brief p. 11) This statement is simply not true. In fact, on the face of the opinion of the Supreme Court of Indiana is acknowledgment that the issue of double jeopardy under the United States Constitution had been presented. That part of the opinion is as follows:

> "Relator now requests this Court to order the Marion Superior Court to discharge him on the ground that a retrial would violate the double jeopardy clauses of the United States and Indiana Constitutions and I.C. §35-41-4-3 [Burns 1979]" (Pet. A. p. A-2)

If the "record as a whole shows either expressly or by clear intendment" that the federal claim and the grounds therefor were brought to the attention of the state court with fair precision, then "the claim is to be regarded as having been adequately presented." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). It is clear on the face of the opinion of the Supreme Court of Indiana that Petitioner raised his Fifth Amendment right against double jeopardy in that court.

B. There Is No Appellate Remedy Available to Petitioner in State Court Prior to Enduring a Second Trial Prohibited by the Double Jeopardy Clause

Respondents challenge this Court's jurisdiction,

contending that Petitioner has state court appellate remedies which would permit him to litigate his double jeopardy claim prior to enduring a second trial. The Indiana Supreme Court held that the "remedy of appeal is adequate to challenge the trial court's discretion" in declaring the mistrial. (Pet. A. p. A-3) Respondents urge that the Indiana Supreme Court did not mean an appeal from a conviction after a second trial, but, rather, must have meant some kind of a state court appeal of Petitioner's double jeopardy claim prior to a second trial.

Respondents do not and cannot deny that an appeal from a conviction after a second trial is inadequate to protect Petitioner's right against double jeopardy. This Court has consistently held that the Double Jeopardy Clause is a guarantee against being twice put to *trial* for the same offense. *Abney v. United States*, 431 U.S. 651, 660-61, 97 S.Ct. 2034, 2041 (1977); *Breed v. Jones*, 421 U.S. 519, 532, 95 S.Ct. 1779, 1787 (1975); *United States v. Wilson*, 420 U.S. 332, 346, 95 S.Ct. 1013, 1023 (1975). Therefore, Respondents argue that Indiana law permits, and the Indiana Supreme Court referred to, an appeal by Petitioner before the second trial occurs. Respondents state that two Indiana appellate procedures were available to Petitioner, as follows: first, an interlocutory appeal under Rule 4(B)(5), Indiana Rules of Appellate Procedure, and, second, an appeal from a final judgment or order under I.C. 35-1-47-1.

Respondents' contention is untenable. The interlocutory appeal process established by Rule 4(B)(5), Indiana Rules of Appellate Procedure, was sought by Petitioner. (Pet. A. p. A-32-33) However, the certification necessary to perfect such an appeal was denied by the trial court on May 2, 1979. (Pet. A. p. A-33) Under the express provisions of Rule 4(B)(5), Indiana Rules of Appellate Procedure (Pet. A. p. A-11-12), and under Indiana case law interpreting that Rule, there is no appealable interlocutory order without both trial court and appellate court certification. *Constanzi v.*

Ryan, 368 N.E.2d 12, 16 (Ind.App. 1977). On May 17, 1979, Petitioner filed in the original action in the Supreme Court of Indiana certified copies of his "Motion For Certification Pursuant to A.P. 4(B)(5)" and the trial court's order denying that motion. (R. p. 271-74) Thus, the Supreme Court of Indiana was aware of the fact that Petitioner had no right to an interlocutory appeal available to him prior to the issuance of the opinion of that court on June 27, 1979.[1] Clearly, this Petitioner sought and was denied that appeal procedure.

The second assertion of Respondents that some pretrial appeal could have been followed is that the denial of the "Motion to Dismiss and for Discharge of Defendant" was a final judgment and appealable as such under I.C. 35-1-47-1. (R. A. p. A-2) Respondents concede that Indiana law does not recognize such an appeal (R. Brief p. 10 n.7), but contend that Petitioner should have attempted such an appeal to create new law in Indiana. Respondents have cited no authority, and Petitioner has found none, that would require a litigant to pursue unauthorized state appellate remedies prior to seeking review by certiorari in this Court.

Moreover, Indiana has held that the denial of a motion for discharge based on double jeopardy grounds is not a final appealable order. *Miller v. State*, 8 Ind. 325 (1856); *Wingo v. State*, 99 Ind. 343 (1884). Respondents admit such but argue that the law might change if retested. The present Indiana law governing appeals in criminal cases is I.C. 35-1-47-1 which provides that a defendant may take an appeal "from any judgment in a criminal action against him..." (R. A. p. A-2) In order to perfect an appeal under the statute, the

[1] Respondents blatently misstate that Petitioner's "Motion for Certification Pursuant to A.P. 4(B)(5)" and the trial court's denial of that motion were not before the Supreme Court of Indiana in the original action. (R. Brief p. 8 n. 3) That motion and the trial court's denial are part of the record in this cause. (R. p. 271-74; Pet. A. p. A-32-33)

defendant must file a motion to correct errors in the trial court as provided by Criminal Rule 16, Indiana Rules of Criminal Procedure. (R. A. p. A-3) Criminal Rule 16 expressly provides that a defendant shall have 60 days "from the date of sentencing" to file a motion to correct errors. These procedures on their face authorize an appeal by a defendant only from a final judgment following conviction and sentencing in a criminal case. It is clear that no such "appeal" as suggested by Respondents exists in Indiana.

The Supreme Court of Indiana, in construing Burns' Ind. Stat. Ann. §9-2301, the predecessor statute to I.C. 35-1-47-1,[2] has consistently held that a "final judgment" which is appealable under the statute exists only where it disposes of *all* of the issues as to the parties and puts an end to the particular case and *all* the issues involved. *Schell v. State*, 245 Ind. 481, 199 N.E.2d 849 (1964); *Desho v. State*, 237 Ind. 308, 145 N.E.2d 429, 430 (1957). The requirements for a final appealable judgment under Burns' Ind. Stat. Ann. §9-2301 were stated by the Supreme Court of Indiana as follows:

> "A final judgment which is appealable has been generally stated to be one which disposes of all the issues as to the parties to the full extent of the power of court to dispose of same and puts an end to the particular case and all the issues involved." *Desho v. State, supra*, 145 N.E.2d at 430.

Moreover, the Indiana Supreme Court has specifically held that the denial of a motion for discharge is not a final judgment under Burns' Ind. Stat. Ann. §9-2301. *Schaaf v. State*, 221 Ind. 563, 49 N.E.2d 539 (1943); *see also, Harshberger v. State*, 234 Ind. 127, 124 N.E.2d 211 (1955).

[2] The provisions of I.C. 35-1-47-1 are identical to Burns' Ind. Stat. Ann. §9-2301. Its provisions were merely recodified under the present Indiana Code.

Respondents' suggestion that Petitioner had a viable appellate remedy under I.C. 35-1-47-1 is contrary to the law of the State of Indiana. Petitioner stated in his Petition for a Writ of Certiorari to the Supreme Court of Indiana that he "has utilized every available State procedure to seek review of his double jeopardy claim prior to enduring a second trial." (Pet. Petition p. 14 n. 2). That was a correct statement of the posture of this case. Petitioner has not pursued and is not required to pursue unavailable state appellate remedies prior to invoking the jurisdiction of this Court under 28 U.S.C. §1257(3).

C. The Indiana Supreme Court Has Finally Rejected Petitioner's Pretrial Plea of Double Jeopardy

Respondents challenge the jurisdiction of this Court, contending that the opinion of the Supreme Court of Indiana is not a final determination of Petitioner's pretrial plea of double jeopardy. Respondents make a two-pronged argument in support of this contention. First, Respondents state that the Supreme Court of Indiana did not decide the merits of Petitioner's double jeopardy claim, holding only that the remedy of appeal was adequate to challenge the trial court's discretion in declaring the mistrial. Secondly, Respondents allege that the opinion of the Supreme Court of Indiana was based on a reasonable state procedural rule applicable to original actions. In support of their contention, Respondents cite three cases, none of which deal with a claim of double jeopardy.

The Supreme Court of Indiana held that the trial court "had the discretion to grant a mistrial when, in his sound judgment, unfair or prejudicial conduct had occurred at the trial" and that the "remedy of appeal is adequate to challenge the trial court's discretion in this matter." (Pet. A. p. A-3) Assuming for purposes of argument that the Indiana Supreme Court did not, by this language, decide the merits of Petitioner's double jeopardy claim, and also assuming that this holding was in accordance with state

procedural rules governing original actions, the opinion of the Indiana Supreme Court is nevertheless "final" as to Petitioner because he has no other available recourse under Indiana law prior to enduring a second trial which he submits is barred under the Double Jeopardy Clause. No matter what construction is placed on the opinion of the Supreme Court of Indiana in this case, that opinion is "final" in that it is subject to no further review in any other state tribunal in Indiana, and it effectively terminates Petitioner's pretrial plea of double jeopardy against him. Even in non-double jeopardy cases, this Court has recognized that a judgment is "final" where the petitioner has no way to preserve his constitutional claims in state court. *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 516, 94 S.Ct. 407 (1973).

In *Harris v. Washington*, 404 U.S. 55, 56, 92 S.Ct. 183, 184 (1971), this court held as follows:

> "Since the state courts have finally rejected a claim that the Constitution forbids a second *trial* of the Petitioner, a claim separate and apart from the question whether the Petitioner may constitutionally be *convicted* of the crimes with which he is charged, our jurisdiction is properly invoked under 28 U.S.C. §1257." (Court's emphasis)

Respondents contend that *Harris* has no application to this proceeding because, in that case, the state's highest court "had unequivocally rejected the double jeopardy claim." (R. Brief p. 6) Respondents attempt to distinguish *Harris*, urging that the Indiana Supreme Court did not reach the merits of Petitioner's double jeopardy claim. Respondents' contention ignores the basic jurisprudential fact that not to decide is to decide. Constitutional rights "are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." *Lawrence v. State Tax Commission*, 286 U.S. 276, 282, 52 S.Ct. 556, 558 (1932). In *Turner v. Arkansas*, 407 U.S. 366, 92 S.Ct. 2096 (1972), the petitioner filed multiple appeals to the Arkansas

Supreme Court from the trial court's denials of petitioner's motions to dismiss the indictment on double jeopardy and *res judicata* grounds. On both appeals the Arkansas Supreme Court affirmed the decisions of the trial court, the latter holding being based on the "law of the case." In granting the writ of certiorari and reversing the decision of the Arkansas Supreme Court, this Court held that "the rejection of petitioner's claim by the Arkansas Supreme Court on procedural grounds does not foreclose our inquiry on this issue." *Turner v. Arkansas, supra*, 407 U.S. at 368, 92 S.Ct. at 2098.

The opinion and judgment of the Indiana Supreme Court in this case has, for all purposes, "finally" rejected Petitioner's pretrial plea of former jeopardy. He has no recourse available in state court prior to enduring a second trial and possible conviction. Accordingly, this Court's jurisdiction is properly invoked under 28 U.S.C. §1257(3). *Harris v. Washington, supra; Turner v. Arkansas, supra; Abney v. United States, supra.*

Respondents' challenge to the jurisdiction of this Court represents an attempt to obfuscate Petitioner's Fifth Amendment right against double jeopardy which is properly before this Court on certiorari. Petitioner respectfully submits that this Court has jurisdiction to hear this cause under 28 U.S.C. §1257(3) and that certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief of Petitioner, Walter Raymond White, has been personally served upon the following counsel, pursuant to Rule 33(1), (3)(b), Revised Rules, Supreme Court of the United States, by hand-delivering three (3) copies of the same to each counsel at their offices:

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Dated this 31st day of October, 1979.

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